

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| NATIONAL SCIENCE AND TECHNOLOGY |) | FCC File Nos. D102126 |
| NETWORK, INC. |) | |
| Licensee of Station WPME699, Monte Nido, La |) | |
| Crescenta, and Glendale, California |) | |
| |) | |
| MOBILE RELAY ASSOCIATES |) | FCC File No. 414473, D134244 |
| Licensee of Station WPPG553, Corona, California |) | |

ORDER ON RECONSIDERATION

Adopted: December 3, 2007

Released: December 4, 2007

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us a Petition for Reconsideration filed by Mobile Relay Associates (MRA), licensee of Station WPPG553, Corona, California.¹ MRA seeks reconsideration of a February 27, 2007 *Order*² by the Wireless Telecommunications Bureau (Bureau), Mobility Division (Division) denying MRA's request for modification (Modification Request) of the license of National Science and Technology Network, Inc. (NSTN) for Station WPME699, Monte Nido, La Crescenta, and Glendale, California.³ For the reasons discussed below, we deny the Petition.

2. *Background.* In 1992, MRA filed an application for a new base station at Sierra Peak and two associated mobile units, operating on frequency pair 472/475.3125 MHz.⁴ NSTN filed an informal objection, arguing that the application was coordinated in error, and that the frequency coordinator had previously informed NSTN that NSTN already had all the available loading on the subject channel.⁵

¹ Petition for Reconsideration (filed March 29, 2007, erratum filed April 2, 2007) (Petition). National Science and Technology Network, Inc. (NSTN) filed an Opposition to Petition for Reconsideration on April 2, 2007. MRA filed a Reply to Opposition to Petition for Reconsideration on April 24, 2007. NSTN filed a Response Filed by National Science and Technology Network, Inc. (NSTN) to Petition for Reconsideration filed by Mobile Relay Associates (MRA) on April 27, 2007, which MRA on the same day moved to strike. We agree with MRA that NSTN's most recent pleading is an unauthorized surreply. See 47 C.F.R. § 1.45(c). Consequently, we grant the motion to strike the Response Filed by National Science and Technology Network, Inc. (NSTN) to Petition for Reconsideration, and will not consider the matters raised therein.

² National Science and Technology Network, Inc., *Order*, 22 FCC Rcd 3916 (WTB MD 2007) (*Order*).

³ See Request to Initiate Modification Proceedings (filed October 1, 2004) (Modification Request).

⁴ See FCC File No. 414473.

⁵ NSTN did not serve MRA with a copy of the objection, but the Commission later concluded that NSTN was not required to serve informal objections on MRA under the *ex parte* rules then in effect. See Mobile Relay Associates, *Memorandum Opinion and Order*, 15 FCC Rcd 20732, 20733-34 ¶¶ 2-3 (1999). We therefore do not accept MRA's characterization of the informal objection as "unlawful." See Petition at 1, 9. Consequently, we reject MRA's contention that the *Order* violated MRA's constitutional due process rights, because the argument is premised in part on MRA "having been the victim of NSTN's *ex parte* rule violation." See *id.* at 10. Nevertheless, we note that MRA's brief discussion of the issue fails to specify whether MRA contends that the decision violated MRA's procedural or substantive due process rights, or both. Moreover, MRA provides no documentation and cites no authority, and we are aware of none, in support of its claim.

3. In February 1998, NSTN filed an application to modify its license for Station WPME699, seeking to increase the mobile count from ninety to five thousand units, and to employ centralized trunking so that NSTN would no longer have to monitor frequency pair 472/475.3125 MHz before transmitting. The application was granted in June 1998.⁶ On October 20, 1999, the Bureau's Public Safety and Private Wireless Division reversed an earlier decision⁷ and granted NSTN's finder's preference request targeting Southern California Alarm Service's Station WIK720, which authorized a base station at Sierra Peak and five associated mobile units, operating on frequency pair 472/475.3125 MHz.⁸

4. On November 12, 1999, the Public Safety and Private Wireless Division's Licensing and Technical Analysis Branch (Branch) dismissed MRA's 1992 application as having been replaced by another MRA application. After MRA informed the Branch that it was a different application that had been replaced, the Branch reinstated MRA's application under a new file number on December 8, 1999, and granted it the same day.⁹

5. On December 30, 1999, NSTN filed an informal petition for reconsideration of the grant to MRA, arguing that the application was properly dismissed as a result of NSTN's informal objection, and that the channel was already loaded to capacity.¹⁰ NSTN also stated that it never filed an application for five mobile units pursuant to the dispositive preference awarded in 1999 because the channel already was fully loaded.¹¹ Our records indicate that the Branch denied the petition on June 2, 2000.

6. On October 1, 2004, MRA requested that NSTN's license for Station WPME699 be modified, pursuant to Section 316 of the Communications Act of 1934, as amended,¹² to delete the Glendale site and the associated mobile and temporary-fixed transmitters; or, in the alternative, to reduce the mobile count and permit only decentralized trunking, which would require NSTN to monitor frequency pair 472/475.3125 MHz before transmitting. MRA asserted that NSTN's 1998 application was defective in that neither NSTN nor its frequency coordinator sought MRA's consent to NSTN's proposed operations as required by Sections 90.187 and 90.313 of the Commission's Rules.¹³ MRA argued that its consent was required because NSTN proposed, *inter alia*, to operate within forty miles on the same frequency as the site for which MRA sought authorization in its then-pending 1992 application.¹⁴

⁶ See FCC File No. D102126.

⁷ Letter dated November 6, 1995 from William H. Kellett, Federal Communications Commission, to Ted. S. Henry, President, NSTN.

⁸ See National Science & Technology Network, Inc., *Order*, 14 FCC Rcd 17671 (WTB PSPWD 1999), *aff'd*, 15 FCC Rcd 16491 (WTB PSPWD 2000).

⁹ See FCC File No. D134244.

¹⁰ See Letter dated December 30, 1999 from Ted S. Henry, President, NSTN to Richard Henderson, FCC—Gettysburg.

¹¹ See *id.* at 1.

¹² 47 U.S.C. § 316.

¹³ 47 C.F.R. §§ 90.187(b)(2) (requiring consent for trunking), 90.313(b) (requiring consent to exceed loading standards).

¹⁴ See Modification Request at 1.

7. On February 27, 2007, the Division denied the Modification Request. It concluded that, under Sections 90.187(b)(2) and 90.313(b) as in effect when NSTN's application was filed and granted, NSTN was required to obtain consent only from existing licensees, and not pending applicants.¹⁵

8. *Discussion.* In its Petition, MRA argues that, contrary to the Division's holding, "the Commission's Part 90 rules protect earlier-filed applications, whether still pending or already granted, under Sections 90.187 and 90.313."¹⁶ We agree with MRA that the *Order* misinterpreted the rules as they were in effect when NSTN's application was granted. While, as the Division noted, Sections 90.187 and 90.313 did not expressly require consent from pending applicants, we agree with MRA that Sections 90.141¹⁷ (providing for the processing of applications in the order received) and 90.176(g)¹⁸ (requiring frequency coordinators to insure that their frequency coordinations do not conflict with those of other coordinators) of the Commission's Rules, as then in effect, extended the protections of Sections 90.187 and 90.313 to earlier-filed applications.¹⁹

9. Our conclusion that the NSTN application should not have been granted without consideration of the MRA application does not settle the instant matter, however, for MRA did not timely seek reconsideration of the grant of NSTN's application. As we stated recently in similar circumstances, because MRA "did not raise these arguments until after the licensing actions had become final, the issue is not whether any procedural error occurred in the processing of [the] application, but whether license modification would 'promote the public interest, convenience, and necessity.'"²⁰ As the Commission has stated, "License modification pursuant to Section 316 should be undertaken only under those limited and unusual cases where, in the light of the circumstances, it is clear that such action will promote the public interest, convenience, and necessity."²¹ While we agree with MRA that there is a strong public interest in upholding the Commission's rules and procedures,²² the fact that NSTN's application may have been improperly granted does not by itself require license modification under Section 316.²³

10. MRA argues that NSTN's application should not have been granted in 1998 due to the pendency of MRA's 1992 co-channel application. NSTN contends that MRA's 1992 application should not have been granted in 1999 because NSTN already had all the available loading when MRA's application was filed. We are unable at this time to determine conclusively whether frequency pair 472/475.3125 MHz was fully loaded at Sierra Peak in 1992, or 1998, or 1999. It therefore is not clear whether MRA's or NSTN's or neither or both applications were improperly granted. As the Commission has said, "the amount of time a party waits to request the modification of another licensee's authorization is certainly a legitimate question for consideration as part of the public interest, convenience, and

¹⁵ See *Order*, 22 FCC Rcd at 3916-17 ¶ 3.

¹⁶ Petition at i.

¹⁷ 47 C.F.R. § 90.141 (1998). This provision was removed effective February 12, 1999. See Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21068-69 ¶¶ 90-92 (1998).

¹⁸ 47 C.F.R. § 90.176(g) (1998). This provision is now codified as 47 C.F.R. § 90.176(h).

¹⁹ See Petition at 5-6.

²⁰ Samuel Moses, *Order on Reconsideration*, 22 FCC Rcd 7425, 7427 ¶ 6 (WTB MD 2007) (quoting 47 U.S.C. § 316(a)(1)), review pending.

²¹ Pacific Gas and Electric Company, *Memorandum Opinion and Order*, 18 FCC Rcd 22761, 22767-68 ¶ 16 (2003).

²² See Reply at 5.

²³ See, e.g., Industrial Telecommunications, Inc., *Order*, 18 FCC Rcd 25267, 25270 ¶ 9 (WTB PSCID 2003).

necessity inquiry under the Communications Act.”²⁴ Thus, the fact that MRA did not file its Modification Request until more than six years after NSTN’s application was granted weighs against a claim that modification would be in the public interest. Under these circumstances, we conclude that MRA has not advanced sufficient public interest considerations or otherwise showed that the requested modification of the NSTN license is warranted under Section 316(a)(1).

11. *Conclusion and Ordering Clauses.* Because MRA has not advanced public interest considerations that warrant modification of NSTN’s license, we affirm the result of the *Order* denying MRA’s Modification Request. Accordingly, we deny MRA’s Petition.

12. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Mobile Relay Associates on March 29, 2007 IS DENIED.

13. IT IS FURTHER ORDERED that the Motion to Strike filed by Mobile Relay Associates on April 27, 2007 IS GRANTED.

14. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATION COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

²⁴ JPJ Electronic Communications, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 5512, 5515 ¶ 6 (2002) (also stating that “[w]hile the Commission’s Rules do not establish an absolute deadline for filing a license modification request, and we do not create one here, the length of time that the target licensee has had its license directly relates to that licensee’s likely level of investment in constructing and operating its facilities, as well as its reliance on that station”).